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DOES THE WAY FORWARD TODAY HAVE TO BE CRIMINAL LAW, ESPECIALLY FOR CRIMES WITHIN THE FAMILY?

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Abstract: Nowadays, when we see a constant recourse to Criminal Law, almost in all areas of human activity, it's necessary to examine what is happening in the micro-community cell that family is. We study the particular case of domestic violence, the evolution of the concept of family and whether Criminal Law is useful or not within the family. There is also a brief reflection on the need for a new concept of family and, therefore, a reform in society.

Keywords: Criminal Law; hypercriminalization; family; domestic violence; modern family; Family Criminal Law.

Introduction¹

Nobody denies that we currently live in a society that, gradually,

¹This article corresponds to the developed version of the presentation I made at Eurocrim-2022, *Does the way forward today have to be criminal law, especially for crimes within the family?* (New perspectives on social control and criminal justice), on the 24th of September 2022.

and then abruptly, allowed itself to be invaded by Criminal Law. And this reality is visible in practically all the domains in which we operate: it is the same in the economic-financial sphere (Vilela, 2020), in the IT sphere, in the sphere of data protection. Thus, the first fact that we can verify is that of the immeasurable expansion of Criminal Law in those spheres, and, of course, within the family itself. And the fact is that we can see it not only in Portugal, but also in Europe and in the USA.

The explanation for this disproportionate increase in the number of crimes is due to the fact that their sentences, especially imprisonment, are highly stigmatizing, thus exerting a general preventive effect on other citizens, which, in our view, is not completely accurate, as we do not believe that Criminal Law should exist only to prevent crimes but rather to punish them. Indeed, we think that the penalties must be understood by the convict in a way that he accepts his sentence has being *fair* and respecting the principle of equality (Costa, 2017).

It means that we reject the phenomenon of hypercriminalization that we are witnessing for several reasons, such as: Criminal Law is an *ultima ratio* law which aim is (or should be) exclusively to punish conduct that violates legal rights that are fundamental to our experience in society (Costa, 2017); secondly: hypercriminalization leads Criminal Law to have a hymen effect, which translates into the dissemination of the

following idea: if I must have a crime in area X, then, perhaps, there should also be another crime in area Y. So, hypercriminalization makes Criminal Law trivial and, consequently, loses its effectiveness as a primal sanctioning law. As we know, every excessive use or resource is harmful to the very thing that is used in excess, or, if you like, abused. Salt is good in food. In excess, it makes it lose its flavour. So, too, is Criminal Law.

At the same time, we are witnessing another very interesting phenomenon, within our societies, regarding the use of Criminal Law, namely the fact that research, especially in highly specialized areas, is very difficult. Hence the criminal who collaborates in the investigation and who allows the conviction of many others is rewarded, either by reducing his sentence or even waiving his compliance². In a single word: premium law spreads into Criminal Law and criminals become collaborators of the State in its *ius puniendi* guise, and therefore losing its prime watermark: to punish (Vilela, 2020).

But it is not just here that Criminal Law loses its primeval vocation of punishing: alongside premium law, there is a whole

²This phenomenon, in the Portuguese legal system, is visible not only in the scope of Classical Criminal Law or Justice, in some rules of the Penal Code, where either the dispensation of penalty or the special attenuation of the penalty is foreseen (respectively in articles 374-B and 377-A), as well as in the scope of Secondary Criminal Law (*Nebenstrafsrecht*), as it is the case of art. 5 of Law no. 20/2008, of 21 April, concerning Criminal responsibility for crimes of corruption in international trade and private activity.

set of institutes that allow the criminal sentenced to be in prison, after all, not to fulfil it. So, the execution of this sentence can be suspended either because it can be replaced by other non-custodial sentences, provided that certain assumptions are verified, or simply because the investigation was not successful, or because the crime has been proved (Vilela, 2020).

Due to all these facts, we wonder whether we should or not continue to look to Criminal Law as the salvation from all our problems. After all, what's the point of criminalizing conducts that violate essential legal interests if, in the end, the criminal process gets in the way and doesn't end with a conviction?

However, the truth it is that the above-mentioned plans are not the only ones in which, on the one hand, we are witnessing an excessive use of crime and penalty, but on the other hand, there's a certain ineffectiveness of Criminal Law to solve crucial and fundamentals problems in our society, because crimes committed within the family are numerous and do not decrease by reason of recourse to Criminal Law. Therefore, let's take a closer look at what is happening in this micro-society that is the family and how Criminal Law is placed there.

First, however, it becomes necessary to see how the family has endured transformation over the years and how it is nowadays, because only from that moment forth we can understand how the criminal phenomenon is presented there.

The family, its transformation, and the crime that we find there

We understand the family as a micro-community, an integral part of the community in general. And that is the reason why we can affirm that crime is innate to the existence of the family (Costa, 2017). In fact, if Criminal Law is natural to society and if the family is one of society's institutions, this means that crime has never been removed from the family, it was simply as if it were not there (Vilela, 2020).

The reason is that, roughly 50 years ago, the family was guided by a set of principles totally different from those that govern it today. Thus, if in the past, the woman was seen almost as an object owned by the husband who had, also, the power to correct and corporally punish their children, since it was lawful for parents to do it.

For instance, in Portugal, although the paragraph of article 5 from the Portuguese Constitution of 1933 embodied the principle of equality before the Law for all citizens, then, regarding women, the single subparagraph also stated the safeguard of their: “differences resulting from their nature [that is, the differences relating to motherhood and issues regarding home] and for the good of the family”.

However, the family has transformed its structure and the

principles governing it because of the conjunction of a set of factors placing a particular emphasis on the women emancipation, that was achieved thanks in part to some feminist movements, and globalization and the (almost) global awareness about the necessity to change this state of affairs.

At the same time, the family began to show herself to the world, thus publicly exposing domestic violence, authoritarianism of some spouses, corporal punishment inflicted by parents on their children and vice versa. Moreover, some behaviours that are socially accepted turn out to be negative when it happens in the family, and a clear example of that is corporal punishment of parents against their children.

Finally, all that to conclude that Criminal Law must enter the family since, as already mentioned, only crime was there even if it was not evident. We must remember it again: mistreatment of spouses, corporal punishment inflicted by parents on children, and theft by close relatives have always existed ever since there are families, but it is true that the most frequent is domestic violence by men against women (Gao, 2021).

However, before returning to crime within the family, we must realize that today a family is not anymore what it used to be, and, to that extent, the criminality that is there is also different. So, let's look at the notion of family and what is the understanding about it today.

The family nowadays

Paraphrasing Bauman, a supporter of the idea of “liquid modernity”, two Portuguese sociologists, João Pedroso and Patrícia Branco, state that “we are dealing with a new family model: the liquid family”, a fact that is due to flexibility and fluidity of the new family scenarios-there is an increase in cohabitations, single-parent families, reconstituted families, transnational families and one-person households, and an increasing number of children born out of wedlock³. And such increasing is not only because of separations and divorces, but also due to the low birth rate, migration processes and globalisation itself. These authors also talk about the LAT family (*living apart together*) which are constituted by couples that have not a common residence and, even if they have not cohabited continuously, they recognize themselves as couples. Therefore, they clamour for social and legal recognition of these relationships as families (Pedroso/Branco, 2008).

To these family models we can also add the same-sex cohabiting families with or without children from one of them or both, families with children that remain in their parents' homes even

³For a study on this type of family, cfr. Lobo, 2008, pages 91-114, which we can define as the one in which a couple, whether married or not, lives at least with a child of one of them, born from a previous relationship. In the same sense, cfr. also Pereira 2021, pages 170 et seq. As for the beginning of what may be the acceptance of this kind of families by the European Court of Human Rights, cfr. again Pereira in the same work and pages.

after reaching their majority and achieving economic independence; and also marriages that break up on the death of one of the spouses, and the spouse that survives calls a family member, for example, a brother or sister, to live with him/her. There are also families which son or daughter, cohabiting or not with their parent, sets out to take charge of their costs and manage their economic-financial situation and assets, and becomes responsible for giving them medication on time and making purchases necessary for their subsistence.

And as our reflection lays on Criminal Law level, a branch of law that is the accurate mirror depicting our situational and spatial experience, a law that presents itself as a reality built (Costa, 2020), we think that it is imperative to work in the field of Criminal Law with a broad notion of *family* in order to be suited to the social reality in which we move today. In fact, we must not lose sight of the fact that Criminal Law more than seeking its incriminations from any other law must rather seeks them in everyday life in society. In other words, Criminal Law, its incriminations, and penalties must take the first step as concrete realities to be effective and aim for peace and social justice within any society.

And for that reason, we necessarily agree with Pereira (2021), when he argues that the family constitutes “*a pre-legal reality*”, thus ceasing to stick to the notion of family resulting from the

article 1576 of the Portuguese Civil Code, as some Portuguese doctrine continues to do so⁴.

We also continue to agree with the author when she brings forward the idea of new family modalities which “the difference [between them] does not nullify the essential character that identifies themselves, a mixture of life communion, affection or desire for affection, intimacy” (Pereira, 2021). And when she concludes later that:

“the family reveals itself as a specific gathering system of people who create links, which intimacy, sexuality and reproductive function play a key role, undoubtedly, but a role that is neither always essential nor sometimes proves to be necessary” (Pereira, 2021).

That is to say that if it is true that the notion of family is pre-legal and has changed as result of the passage of time, it is also urgent to set limits on what may be defined as family, so as not to consider that family is any experience of living together, as long as people wish it. It is therefore urgent to bear in mind Beck's words that Pereira reminds us of-in that author's words, the family of modern times is caricatured as “a zombie”, “partly alive”, seeing its most solid constitutive elements being broken and replaced with elements that the autonomy of the will dictates: “having the family that she wants, as she wants”

⁴Thus, for example, Guilherme de Oliveira continues to argue that: “the family, in a legal sense, constitutes a group of people” linked to each other by marriage, kinship, affinity and adoption”. In fact, according to our opinion, the author is critical of the fact that cohabitation, civil godfathering, and non-biological parenthood approved in the context of assisted reproduction can be considered family relationships (Oliveira, 2021, pp. 37 and 38). As it's already clear for all, that is not how we think, thus we distance from this author.

(Pereira, 2021). Indeed, it is necessary to pay attention to what has just been said about the *liquid family* that is discussed by the above-mentioned sociologists, according to Bauman. In this respect, therefore, let us look at some criminality that we can find within the family.

Criminal Law inside this new family

Briefly, we will identify the conducts that, in the family, may be part of criminal law, and such analysis will allow us to answer another question which is translated into knowing the reason why criminal law will have to intervene in the intimate cell that unites people, in a stable way. We believe that after this step we will be able to rehearse a possible independent answer to the question in title.

There is no denying that a set of crimes clinging to the new family models, to a certain extent, are a novelty within Criminal Law—we think, for example, about the neo-criminalization of violations concerning visiting rights of children whose parents do not live together that occurred in 1995 (child abduction, laid down in article 249 (1) (c)), in its extension in 2008); we also have in mind the violation of maintenance obligations from the parent who has to pay maintenance but does not do so, a crime that was also included in the CP in 1995, which scope has already been expanded significantly in this century. We can also

list the crimes of homicide and physical assault by parents against children and vice versa, respectively laid down in article 132 (2) (a) and article 145 of the CP, the crime of exposure or abandonment, for example, by parents against children (article 138 (2) of the CP), as well as the always problematic issue of parental corporal punishments on children (Faria, 2012) that, at the present moment, are less and less tolerated from a legal-criminal point of view. In addition to these crimes against human being, we can also refer to the case of crime of theft and breach of trust (article 207, (1), a)) which has a procedural nature of “private” offences (crimes particulares)⁵ conferred by the legislator, thus making difficult and more onerous the prosecution of a criminal offence for the victim-family (Vilela, 2021).

Nevertheless, both regarding the new models of society and crime present there, domestic violence is undoubtedly winning the race. Therefore, let’s particularly pay attention to this crime, so that in the end we can rehearse an attempt to answer the question posed in the title.

⁵ In Portugal, from a procedural point of view, there are public crimes, which do not require a complaint to initiate proceedings and go ahead whit it; semi-public crimes, which criminal procedure depends on the filing of a complaint, and the particular offences mentioned below, whose criminal procedure has more requirements than the previous ones. In other words, it is necessary to file a complaint, to appoint a representative and comply with other procedural rules laid down in the Code of Criminal Procedure.

The specific case of domestic violence

To face the constant increase in violence within the family, in 2007, the legislator separated this crime from the mistreatment, since he has already changed it three times, and from that date, it was laid down that a single conduct of the offender that is, therefore, not reiterated may constitute a crime of domestic violence. After 2013, the article concerning domestic violence states that it can occur between spouses and ex-spouses, whether they cohabit or not, between boyfriends or ex-boyfriends, on children, on particularly defenceless people who live with the offender, among others, and it can involve a slap passing through mental abuses, for injuries and ending up in the fact that the offender prevents the victim from accessing or getting enjoyment of his/her own economic resources.

Aggravations are also provided for when this crime is committed under certain circumstances, for example, in front of a minor, in the victim's home, etc. Therefore, nowadays, the crime of domestic violence in Portugal can be committed through “physical or mental abuse, including corporal punishment, deprivation of liberty, sexual abuse/offences, or prevent accessing or getting enjoyment of funds and patrimonial resources/assets of their own or in common ownership” (nº1, article 152 of the CP).

The prison sentence can have a maximum limit of 5 or 8 years and it also provides for the possibility of an accessory penalty of prohibition for the offender to contact the victim, and the removal of the latter from the workplace and the victim's residence.

At the same time, there is a whole other set of legal diplomas, such as the victim's statute, granting protection rights, after the beginning of the criminal procedure, which can be initiated through a victim's complaint or a third party's denouncement. Face to this scenario in which many changes are made to the norm in question, where anyone, regardless of not being a victim of the crime of domestic violence, can denounce it, everything leads us to believe that the intervention of Criminal Law, in the context of domestic violence, is a success.

Sheer mistake: in Portugal, the number of occurrences recorded between the fourth quarter of 2018 and the fourth quarter of 2021 is around 7,500, there has not been a downward trend over these years and, this year, until the end of September, there were twenty-one deaths (twenty women and one child) in the context of domestic violence⁶. Paradoxically, the number of prisoners serving time in prison for the crime of domestic violence, in that period, never reached 1,000 which turns out to be insignificant, given the number of occurrences recorded in the same period.

⁶References collected in <https://www.cig.gov.pt/area-portal-da-violencia/portal-violenciadomestica/indicadores-estatisticos/#title1>, on 13th November 2022.

Also, in this period, the number of provisional suspensions of proceedings is below 2000⁷.

In summary: it happens that the occurrences do not go down, the number of convicted for such a crime who is serving an effective prison sentence is small. So, we must put the question: what contributes to this situation?

Certainly, its ineffectiveness, in this field, is not revealed thanks to the premium law, but because according to the difficulty of proving the facts that make up the crime and the fact that the victim himself does not seek the conviction of his/her family member.

In fact, there is no use in resorting to Criminal Law if accusations and the investigations are not properly formulated; if the evidence that allows conviction is not sufficient and properly collected, and if victims are not properly under protection after denunciation.

Adopting a legal regime of preventive measures to avoid domestic violence is actually better than resorting to Criminal Law as a punitive law, without forgetting measures of protection and assistance to victims that have already been legally implemented in the Portuguese legal system and that, among us, are making their way (Albano, 2022).

So, it seems to us that neither the invasion of Criminal Law,

⁷ See, again, the document referred in the previous note.

either in many specific areas of our society or in the micro-society which is the family, nor the increase in crimes, nor the reinforcement of penalties, nor the excessive spread of penalties contribute to reduce criminality. And the following question must, thus, be asked:

Does Criminal Law have got to be the way forward today, especially for crimes within the family?

Before answering the question that led us to this reflection, we must say that it does not cross our minds to ban Criminal Law as a way of suppressing and, to a certain extent, preventing conducts that offend legal assets with criminal dignity, that only can be fought effectively having recourse to the *instrumentarium* proper to Criminal Law, that is the penalty. Besides, instead of defending its use in the extreme, we defend using it use reasonably even within the family.

Nevertheless, we believe that the solution to the problems, having recourse to Criminal Law, requires a rigorous work in making legal types of crime, whether it is domestic violence or any other. There is a need to do laborious work in identifying connections between people that are, in fact, family relationships and no other (Vilela, 2020). Finally, during criminal proceedings, and when it ends with the conviction of the offender, there is a need to provide means to support the

victim, and the convicts must see the error of their ways, which all in all may already represent a real revolution in the way we use Criminal Law.

But we all must agree that it's not enough. We need to go deeper-we need to learn again the culture of respecting others, of new education paradigms, of my responsibility towards the others, and yet we don't think that we will get or achieve none of this through Criminal Law⁸.

We need a revolution in our present society, starting by trying to implement, and then develop, a culture of respect. First, for the other, then for the family, therefore arriving at the "common home" represented by our society, where, perhaps, it is necessary to curb the extreme "liquidity" (again Bauman) of our society, the liquid society in which the individual elevation to universal law remains marked by "an absence of prefigured ideology, an option for criteria of antagonistic meaning" (Pereira, 2021).

So, if this is the case, and certainly we have reasons to believe it is, we are certainly not moving towards the *other*, who is different from me, but rather to ourselves. It's what makes *my* indifference towards the other, who is different from me, making it impossible to build a common *ethos* of values which, deep down, are the cement that unites the family and, ultimately,

⁸ We believe that Albano also shares this idea, 2022, p. 408.

society itself.

If this is a good thing as it contributes to our personal affirmation within society in general, it is also true that it has a disadvantage-as a whole, we do not know what to defend nor what our bastion is.

Basically, the question is: what is binding me to the other? What do I defend as much as the other?

Now, facing this picture, we can see that Criminal Law is out of kilter and is being built in the wrong way for family domestic violence.

Above all, it is urgent to define the family and, from there on, give the criminal protection it needs. But always respecting the principle of the last reason of criminal law not being able to intervene correctly, because it only acts this way when there are no doubts about what is essential.

Of course, this does not mean removing Criminal Law from within the family, let alone from the family.

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